

Claimant injured his back on November 15, 1995, while working for respondent. The claim was litigated and Judge Benedict issued an Award on July 22, 1997, finding claimant had a 100 percent wage loss and a 0 percent task loss that created a 50 percent permanent partial general disability. That Award was appealed to the Appeals Board, which affirmed the 50 percent work disability. Respondent and its insurance carrier

appealed the Board's decision to the Court of Appeals. On February 11, 2000, the Court of Appeals affirmed the Appeals Board's decision.

While the original award was pending before the Court of Appeals, respondent and its insurance carrier learned that claimant had started working for the City of Manhattan and that claimant, therefore, no longer had a 100 percent wage loss. On October 28, 1999, respondent and its insurance carrier filed an application with the Division of Workers Compensation to review and modify the Board's decision that claimant had a 100 percent wage loss and a 50 percent permanent partial general disability.

On December 8, 1999, the parties appeared before Judge Benedict for a review and modification hearing. After that hearing, in which claimant testified that he began working for the City of Manhattan in March 1998, the Judge entered an Order dated December 9, 1999, declaring that claimant was disqualified from receiving any further permanent partial disability benefits. Relying upon that Order, the respondent and its insurance carrier stopped paying claimant permanent partial disability benefits. In response, claimant filed an application for penalties, which Judge Benedict heard on February 9, 2000.

The subject of this appeal is the February 10, 2000 Order in which Judge Benedict denied claimant's request for penalties. Claimant contends Judge Benedict erred. Claimant argues that penalties are due as the December 9, 1999 Order declaring that claimant was disqualified from receiving any additional permanent partial disability benefits was void. Therefore, claimant requests penalties under K.S.A. 44-512a.

Conversely, respondent and its insurance carrier contend the Order denying penalties should be affirmed. They argue that claimant began working for the City of Manhattan and began earning at least 90 percent of his pre-injury average weekly wage. Therefore, they argue that claimant's permanent partial general disability should have been reduced to the nine percent whole body functional impairment rating and, therefore, the ultimate award of permanent partial disability benefits was exhausted long before the Judge entered the December 9, 1999 Order. The respondent and its insurance carrier argue that penalties should not be assessed because permanent partial general disability benefits were neither due nor owing.

The only issue before the Appeals Board on this review is whether claimant is entitled to penalties for the respondent and insurance carrier's failure to pay permanent partial disability benefits following the December 9, 1999 Order.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

After reviewing the entire record, the Appeals Board finds:

On February 14, 2000, Judge Benedict entered the Award in the Review and Modification proceeding. In that Award, the Judge found that claimant started working for the City of Manhattan on March 16, 1998, and that the effective date for modifying the award was April 28, 1999. Additionally, the Judge found that as of April 28, 1999, claimant was earning at least 90 percent of his pre-injury average weekly wage and, therefore, claimant no longer had any work disability as of that date.

Based upon those findings and conclusions, the permanent partial general disability decreased from the 50 percent work disability to claimant's nine percent whole body functional impairment rating. Because the award for a nine percent permanent partial general disability had been exhausted as of the effective date of the modification (April 28, 1999), claimant was not entitled to receive any more weeks of those benefits.

The claimant appealed the Review and Modification Award to the Appeals Board, which heard oral argument in that appeal on the same date as oral argument in this appeal. On today's date, the Appeals Board has affirmed the February 14, 2000 Review and Modification Award.

Under the *Ruddick*¹ decision, a respondent and its insurance carrier may cease making permanent partial general disability payments when (1) a worker begins earning at least 90 percent or more of the average weekly wage that the worker was earning at the time of the injury and (2) the ultimate award to which the worker is entitled has already been exhausted.

The Appeals Board concludes that the *Ruddick* decision is controlling. Because claimant's award of permanent partial disability benefits was exhausted as of the effective date of the modification, April 28, 1999, there were no permanent partial disability benefits due and owing claimant when the respondent and its insurance carrier terminated the payments in December 1999. Therefore, the February 10, 2000 Order denying penalties should be affirmed.

WHEREFORE, the Appeals Board affirms the February 10, 2000 Order entered by Judge Benedict.

IT IS SO ORDERED.

Dated this ____ day of August 2000.

¹ *Ruddick v. Boeing Co.*, 263 Kan. 494, 949 P.2d 1132 (1997).

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER**CONCURRING OPINION**

I agree that the *Ruddick* decision controls the outcome of this request for penalties. Unfortunately, the *Ruddick* decision removed the teeth from the penalties section of the Workers Compensation Act as it permits respondents and their insurance carriers to unilaterally terminate an award of benefits before the award has been modified in a review and modification proceeding. As a practical matter, *Ruddick* renders the review and modification proceeding an elective procedure. Why initiate such a proceeding when respondent and its insurance carrier can stop paying benefits without any formal change in the award? Before the evidentiary record was completed, the Judge entered an interlocutory or preliminary order terminating permanent partial disability benefits. I do not believe the legislature intended that result when it specifically provided that the administrative law judge was required to “hear all competent evidence offered” in determining whether the award should be modified.

BOARD MEMBER

c: John J. Bryan, Topeka, KS
Frederick J. Greenbaum, Kansas City, KS
Bryce D. Benedict, Administrative Law Judge
Philip S. Harness, Director